

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 18271
Issued to: Richard Lee HODNETT

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2447

Richard Lee HODNETT

This appeal has been taken in accordance with 46 USC 7702 and 46 CFR 5.701.

By order dated 16 January 1986, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's license for two months, remitted on twelve months' probation upon finding proved the charge of misconduct. The charge was supported by two specifications. The first specification found proved alleges that Appellant, while serving as operator aboard the M/V BELCHER PENSACOLA, under the authority of the captioned document, on or about 18 July 1984, wrongfully failed to give notice as soon as possible to the nearest Coast Guard Marine Safety Office of the accidental grounding of tank barge Belcher No. 35, under tow of the BELCHER PENSACOLA, as required by 46 CFR 4.05-1. The second specification found proved alleges that Appellant, while acting in the same capacity, on or about 19 July 1984, after an underwater survey and the unauthorized repair of tank barge Belcher No. 35 at Key West, Florida, wrongfully failed to make known to officials designated to enforce inspection laws, at the earliest opportunity, a marine casualty producing serious injury to said tank barge.

The hearing was held in Miami, Florida, on 13 March 1985.

At the hearing Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced in evidence six exhibits and the testimony of two witnesses.

In defense, Appellant introduced in evidence two exhibits and testimony of one witness.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specifications had been proved, and entered a written order suspending all licenses and /or documents issued to Appellant for two months,

remitted on twelve months' probation.

The complete Decision and Order was served on 18 January 1986. Appeal was timely filed on 14 February 1986 and perfected on 17 April 1986.

FINDINGS OF FACT

At all times relevant on 18 July 1984, Appellant was serving as operator aboard the M/V BELCHER PENSACOLA under the authority of his Coast Guard license which authorizes him to act as operator of uninspected towing vessels of not more than 300 gross tons upon oceans, including the waters of the U.S, not including Western Rivers. The M/V BELCHER PENSACOLA is an uninspected towing vessel of 96 gross tons, 64.7 feet in length, owned by Belcher Towing Company. On 18 July 1984, the BELCHER PENSACOLA was towing the barge BELCHER No. 35, a tank barge 298 feet in length, with a cargo of oil on a voyage to Key West, Florida.

At approximately 1750 on 18 July 1984, the BELCHER No. 35 grounded. Following the grounding, Appellant, who was on watch at the time and was at the helm, reported the incident via radio to his employer's dispatcher. Appellant did not report the incident to the Coast Guard at that time. Subsequently, the BELCHER PENSACOLA freed the barge and the flotilla continued on to Key West. An inspection of the barge at Key West revealed no contamination of the cargo, although the cargo level for No. 2 port tank was "off by 1 foot, 4 inches. An underwater inspection on 20 July revealed a hole approximately 5 inches long and 3/8 inches wide in the hull of No. 2 port tank. Temporary repairs were made, at a cost of \$50.

Appellant and another licensed operator aboard the vessel prepared a "Report of Marine Accident, Injury or Death," CG Form 2692, dated 18 July 1986. This form was mailed to the Coast Guard Marine Safety Office, Miami, Florida by an official of Belcher Towing Co., on 23 July 1984, and was received by the Marine Safety Office on 24 July 1984. On 25 July 1984, The Marine Safety Office received telephone notice that a pollution incident involving the BELCHER No. 35 had occurred at the Belcher facility in Miami.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant urges that:

1. The essential element of "willfulness" was omitted from the charge and specifications.

2. The charge and specifications were multiplicitious in that they pertain to the same casualty.

3. The charge and specifications were not proved.

4. Appellant was prejudiced by the introduction of evidence of the minor oil spill from the BELCHER No. 35.

5. The sanction entered was disproportionate to the offense.

6. The Coast Guard "brought charges" against Belcher Oil Company for the same offense.

Because of the disposition of this appeal, Appellant's contention that the specifications were multiplicitious, and the final three bases of appeal from the above listing are not discussed.

Appearance: David F. McIntosh, Esq.; Corlett, Killian, Hardeman, McIntosh & Levi, P.A.; 116 West Flager St., Miami, Florida 33130.

OPINION

I

Appellant argues first that since he was charged with violation of a regulation issued under Title 52 of the Revised Statutes (46 CFR 4.05-11(a)), the proceeding was therefore based on 46 USC 239, which refers to a "willful" violation of the statutory and regulatory provisions, and requires that the charge be "violation of statute" of "violation of regulation."

This argument misstates the charge, as well as the current state of the law. It is well settled that a violation of a duty imposed by formal rule or regulation may be charged as misconduct and that there is no requirement that willful misconduct be proved. Appeal Decision 2248 (FREEMAN). Further, 46 USC 239 was repealed by Pub. L. No. 98-89, Aug. 26, 1983, 97 Stat. 500. The pertinent statute is now found at 46 USC 7703, which no longer requires that a violation of law or regulation be willful.

II

Appellant was charged first with failure to give notice as soon as possible of the grounding of the barge, as required by 46 CFR 4.05-1. He argues that this charge was not proved.

The regulation is directed to the "owner, agent, master or person in charge of a vessel involved in a marine casualty." (Emphasis added.) The regulatory requirement can thus be met by

any of a number of persons. In this case, a Form CG-2692, signed by the other operator on the towing vessel as "Master or Person in Charge" (Resp. Exh. B), was submitted to the cognizant Coast Guard Marine Safety Office. Coast Guard regulations specifically provide that this written notice, which is required to be submitted by the "person in charge," can provide the notice required by 46 CFR 4.05-1 if submitted "without delay." 46 CFR 4.05-10. The term "without delay" is not defined. However, as stated by the Commandant in Appeal Decision 2261 (SAVOIE):

46 CFR 4.05-10(a) and (b) clearly contemplates that notice of a marine casualty may be effected by personal appearance of the person in charge or even in written form filed by mail. Since the regulations themselves allow less expeditious forms of notice to qualify as notice "without delay," the "as possible" requirement of 46 CFR 4.05-1 takes on a new lustre.

Title 46 USC 6101(b) requires marine casualties to be reported "within 5 days...." The Form CG-2692 was mailed on 23 July 1984, five days after the casualty, and was received by the Coast Guard the following day. The regulation allegedly violated does not impose a reporting requirements upon any single individual. As noted supra, the requirement may be met by several persons, including the person in charge of the vessel. However, the identity of the person in charge in this case is not clear. The Investigating Officer argued that Appellant was the person in charge. (I.O. Exh. 7.) The Form CG-2692 indicates that the person in charge was the other operator aboard, even though he was not on watch at the time. This disparity, the provisions of 46 CFR 4.05-10 discussed supra, and the fact that this casualty was reported to the Coast Guard, albeit not by Appellant, compel me to dismiss the specification as not proved by substantial evidence.

III

The second specification alleges that Appellant failed to report a marine casualty producing serious damage to the barge. Appellant contends that this specification was not proved by substantial evidence. He advances several grounds for this argument.

Initially, Appellant urges that the Administrative Law Judge erred in taking judicial notice of the charge sheet to find that the Coast Guard had not been notified of the grounding. In considering the notice question, the Administrative Law Judge stated:

The service of the charge sheet alleging specifically no

notice was given under the regulation or statute implies that nothing was noticed or reported prior to July 24. Said implication is buttressed by LCDR STEINFORD's testimony that the Coast Guard had no knowledge of the grounding or repairs prior to July 25th. Moreover, this Administrative Law Judge may take official notice of the absence of any such report prior to 24 July.

Clearly, a charge sheet does not constitute evidence, and any reliance of the Administrative Law Judge upon the charge sheet would constitute error. 46 CFR 5.05-17(a) [current version at 46 CFR 5.23] Further, the absence of a report being filed with the Coast Guard prior to 24 July 1984 is not a fact of which official notice may be taken. See Fed. R. Evid. 201, see also 3 Davis, Administrative Law Treatise, 15:6 (2d ed. 1980). However, any error committed is harmless, since the record clearly supports the Administrative Law Judge's finding that the CG Form 2692 was received on 24 July. (The Coast Guard "date received" stamp indicates 24 July on the Form 2692. The Port Manager for Belcher Towing testified that he mailed the report on 23 July.)

Appellant continues his argument that the charge was not proved by asserting there is no evidence that he was aware of the damage to the tank barge. Appellant was charged with a failure to make known to officials designated to enforce inspection laws, at the earliest opportunity, a marine casualty producing serious injury to the tank barge. This requirement is established by 46 USC 3315, under which licensed individuals are required to report damage to a vessel subject to inspection. Appellant was licensed under 46 USC 7101, and is clearly responsible under the statute to make the report. However, the record is unclear concerning Appellant's knowledge of this damage.

On 19 July 1984, Appellant made an entry in the BELCHER PENSACOLA's log (I.O. Exh. 1) which recited that the cargo level for No. 2 port tank was "off by 1 foot, 4 inches. While this entry is indicative of a breach in the hull, I am persuaded that this case requires remand to the Administrative Law Judge for additional findings of fact to account for the variance in the cargo level.

The record does not reflect any pollution incident until the one reported on 25 July 1984. Additionally, it is apparently uncontested that the cargo tanks were checked for water contamination upon the barge's arrival in Key West, with negative results. The Administrative Law Judge's Finding of Fact No. 12 recited that "the cargo level for No. 2 port tank was off 1 ft. 4 inches," and that "an underwater inspection...revealed a hole..." It is unclear from this finding, however, that the hole was in the No. 2 port tank.

Without question, a hole in the cargo tank of a laden single-skin (Resp. Exh. B) tank barge which would cause the cargo level in the tank to drop by 1 foot, 4 inches is "serious damage." Whether the cargo level change resulted from the hole, and, if so, whether Appellant had knowledge of the damage, thereby becoming responsible to make the required report, are questions which must be resolved on remand.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that the findings of the Administrative Law Judge are not supported by substantial evidence of a reliable and probative character.

ORDER

The decision and order of the Administrative Law Judge dated 16 January 1986 at Jacksonville, Florida, is MODIFIED as follows:

With respect to the first specification, the findings are SET ASIDE, and the specification is DISMISSED.

The order suspending Appellant's license is VACATED. The case is remanded to the Administrative Law Judge for further proceedings consistent with this decision.

James C. Irwin
VICE ADMIRAL, U. S. COAST GUARD
ACTING COMMANDANT

Signed at Washington, D.C. this 10 day of April, 1987.